PD-0517-16

IN THE COURT OF CRIMINAL APPEALS

Leax v. State

Motion to File Additional Brief

and

Petitioner's Reply Brief

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Mr. Leax moves under Texas Rule of Appellate Procedure 70.4 for permission to file this additional brief in response to the State's Brief.

In its brief the State argues that Mr. Leax "lacks standing" because "the amendments to the statute have eliminated any alleged chilling effect on protected expression." State's Brief at 2. This is an argument that a majority of the Supreme Court rejected in Justice Scalia's dissent in *Massachusetts v. Oakes*, 491 U.S. 576, 585-87 (1989).

If, as Mr. Leax argues, what remained of section 33.021 after *Ex Parte Lo* was void, then the statute was void from its inception. A void statute cannot support a conviction — not even the conviction of a wrongdoer. If the statute was void from its inception, then there was no valid authority for putting Mr. Leax in prison. He raised the issue pretrial. And yet he sits in prison.

Several other petitions for discretionary review implicating this issue are still pending. There are six that counsel knows of:

Ex Parte Chapman, No. PD-0326-16
Ex Parte Radford, No. PD-0327-16
Ex Parte Alvarez, No. PD-0328-16
Ex Parte Mahmoud, No. PD-0442-16
Ex Parte Parker, No. PD-0949-16
Ex Parte Ingram, No. PD-0578-16

In none of these cases have the defendants, as far as counsel knows, pled guilty. Yet the State's "no standing" argument would apply with equal force to them — they would, if the state were right, have to be prosecuted under an unconstitutional statute, facing a trial at which they would be barred by subsections 33.021(d)(2) and (d)(3) from presenting inferential-rebuttal evidence, because the legislature has amended the statute.[1]

Whether government "has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," State's

[1] In *Chapman*, *Mahmoud*, and *Ingram* the State is not required by the pleadings to prove that the defendants "believed" the complainants to be children. Those defendants could, if the State's "no standing" argument were valid, be prosecuted for communicating with people who were not children and whom they did not believe to be children.

Brief at 9, *quoting Texas v. Johnson*, 491 U.S. 397, 406 (1989) is irrelevant to this case: The "conduct" at issue here is the written or spoken word. While non-speech conduct might because of its expressive nature be converted to speech, the State offers no precedent allowing the conversion of the written or spoken word to non-speech conduct. And indeed, none exists.

The Battle Has Not Been Joined

Mr. Leax's sole ground for review was this:

> Whether section 33.021 of the Texas Penal Code is a content-based restriction.

The State addresses this ground for review in a single paragraph of its brief, on page 10. There the State cites:

- This court's dictum in *Ex Parte Lo*;
- An unpublished Austin case; and
- Published cases from Beaumont, Amarillo, Eastland, the First District, and San Antonio.

In *Ex Parte Zavala*, 421 S.W.3d 227, 231 (Tex. App. — San Antonio 203, pet. ref'd); *Ex Parte Wheeler*, 478 S.W.3d 89, 94 (Tex. App. — Houston [1st Dist.] 2015, pet. ref'd); *Collins v. State*, 479 S.W.3d 533, 540 (Tex. App. — Eastland 2015, no pet.); and *Ex Parte Fisher*, 481 S.W.3d 414, 419 (Tex. App. — Amarillo 2015, pet. ref'd) courts relied

on this Court's dictum in *Ex Parte Lo* for the proposition that section 33.021(c) restricts conduct rather than speech.

In *State v. Paquette*, 487 S.W.3d 286, 289 (Tex. App. — Beaumont 2016, no pet.) the court did not rely on that dictum, but instead relied on its own unpublished opinion in *Ex parte Victorick*, 2014 WL 2152129 at *2–3 (Tex. App. — Beaumont, May 21, 2014), which in turn relied on *Ex Parte Lo*'s dictum.

So the State's argument here relies, whether directly or indirectly, entirely on *Ex Parte Lo*'s dictum.

The State has not attempted to rebut Mr. Leax's arguments (forming the bulk of his brief) that that dictum is incorrect and should not become precedent. The State has not addressed *Ex Parte Thompson*, 442 S.W.3d 325 (Tex. Crim. App. 2014); *Reed v. Town of Gilbert*, 476 U.S. ____, 135 S.Ct. 2218 (2015); *Hill v. Colorado*, 530 U.S. 703 (2000); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Cincinnati v. Discovery Network, Inc.*, 507 US 410, 429 (1983); or even *Ex Parte Lo*'s assertion that "if it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content based." *Ex Parte Lo*, 424 S.W.3d at 15 fn12.

On the sole issue presented, the State has not even joined issue.

The Ultimate Issue

Because section 33.021 is a content-based restriction, it is presumed to be unconstitutional and the State has the burden of proving otherwise. The State has failed to do so.

U.S. v. Williams

U.S. v. Williams, cited by the State for the proposition that "[s]oliciting speech requires no imminence and no likelihood of success, but only that the person offer to give or receive something that is lawfully proscribed," *State's Brief* at 12, does not create a new category of unprotected solicitation absent an intent that a crime be committed, but instead stands only that for the narrower proposition "that offers to provide or requests to obtain *child pornography* are categorically excluded from the First Amendment." *U.S. v. Williams*, 553 U.S. 285, 299 (2008) (emphasis added). Child pornography is *sui generis*, and no broader rule can be read into this categorical exclusion.

In its cases since *Williams* the Supreme Court has not listed "solicitation" under *Williams* as a category of unprotected speech separate from incitement. See *Alvarez*, 132 S.Ct. 2537, 2544; *Stevens*, 559 U.S. 460, 468 (both listing incitement under *Brandenburg* — but not solicitation under *Williams* — as a category of unprotected

speech). Nor has the court ever, outside the context of child pornography, modified or limited the *Brandenburg* principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *see, e.g., U.S. v. Alvarez*, 132 S.Ct. 2537, 2544 (2012) (describing incitement as "intended, and likely, to incite imminent lawless action" and citing *Brandenburg*).

"Solicitation is an inchoate crime; the crime is complete once the words are spoken *with the requisite intent*, and no further actions from either the solicitor or the solicitee are necessary." *United States v. White*, 610 F.3d 956, 960 (7th Cir. 2010) (emphasis added). This Court recognized in *Ex Parte Lo* that the solicitation statutes that have been upheld have involved either obscenity or the specific intent that some sex crime be committed:

> Courts all across the United States have upheld these statutes. They share either of two characteristics: (1) the definition of the banned communication usually tracks the definition of obscenity as defined

> by the Supreme Court in *Miller v. California*; or (2) the statutes include a specific intent to commit an illegal sexual act….

Ex Parte Lo, 424 S.W.3d at 21.

Four Scenarios

The State notes "three scenarios involving solicitation of a minor." *State's Brief* at 15. In this count it takes into account only section 33.021(a)(1)(A) and ignores section 33.021's other infirmity: subsections (d)(2) and (d)(3), which eliminate the inferential-rebuttal defenses of "lack of intent" and "fantasy" and so bring within the reach of the statute speech that at first blush might appear to be solicitation, but that is not intended to result in the commission of a crime (an essential element of constitutionally proscribable solicitation).

As a result, the statute forbids four (and not three, as the State alleges) types of speech:

	Speech to someone believed to be a minor.	Speech to someone not believed to be a minor.
Speech intended to solicit.	Unprotected speech.	Protected speech.

Speech not intended to solicit (including fantasy).	Protected speech.	Protected speech.

Just as speech to someone whom the defendant does not believe to be a minor is constitutionally protected, speech to someone whom the defendant believes to be a minor, but which is not intended to solicit a crime (whether because it is fantasy speech or because it is not intended to result in a meeting: inferential-rebuttal defenses eliminated by subsections (d)(2) and (d)(3)) is constitutionally protected.

This is not a situation in which the legislature has defined an offense that happens to restrict some protected speech. Here the legislature in 33.021(c) defined an offense that restricted minimal protected speech, and then tacked on provisions — subsections (a)(1)(A), (d)(2), and (d)(3) — intended *only* to expand the offense to protected speech.

Not the Least-Restrictive Means

The least-restrictive means of satisfying the compelling state interest of protecting actual children from actual sexual violence is with a statute such as the new section 33.021, which defines "minor" so that the defendant must believe the minor to be a child, and which restores the constitutionally mandated inferential-rebuttal defenses of "lack of

intent" and "fantasy." Because the statute at issue here does not satisfy the least-restrictive-means test it fails strict scrutiny. *See Ex Parte Thompson*, 442 S.W.3d at 344.

This Court May Not Rewrite the Statute

The State proposes that this Court narrow the unconstitutionally overbroad statute by "eliminat[ing] the definition of minor as 'an individual who represents himself or herself to be younger than 17 years of age.' " *State's Brief* at 19. This is not a viable solution to the problem of the statute's unconstitutionality.

First, the Texas Constitution forbids the Judicial Department from exercising legislative powers. Tex. Const. art. 2 § 1. "The Legislature is *constitutionally entitled* to expect that the judiciary will faithfully follow the specific text that was adopted." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). This Court certainly may not "eliminate," as the State proposes, a portion of a statute.

If a statute is not readily subject to a narrowing construction, this Court may not rewrite it to meet Constitutional scrutiny. *Thompson*, 442 S.W.3d at 339. A law is not susceptible to a narrowing construction when its meaning is unambiguous. *Id.* Section 33.021(a)(1)(A)'s

definition of "minor" is broad, but is not ambiguous, and so is not susceptible to a narrowing construction.

Second, the State, in that section of its brief in which it calls for this Court to legislate, again forgets subsections (d)(2) and (d)(3). To render the statute constitutional, this Court would have to eliminate not only subsection (a)(1)(A), but also subsections (d)(2) and (d)(3). Like subsection (a)(1)(A), subsections (d)(2) and (d)(3) render the statute overbroad, but are not themselves ambiguous.

The Legislature revised section 33.021 in 2015, in light of this Court's decision in *Ex Parte Lo*. It did its job prospectively and eliminated subsections (a)(1)(A), (d)(2), and (d)(3). This Court should reject the State's suggestion that it violate separation of powers by doing that job — *the Legislature's job* — retrospectively.

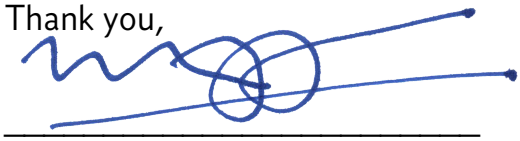
Conclusion

The remains of section 33.021 of the Texas Penal Code are a content-based restriction. The statute is not the least restrictive means of achieving the State's compelling interest.

As in the case of *Ex Parte Lo*, no constitutionally punishable conduct would be rendered unpunishable as a result of striking down section 33.021: all of the constitutionally proscribable speech — actual

solicitation of a crime — that section 33.021 covered was also forbidden by section 15.031 of the Texas Penal Code.

Thank you,



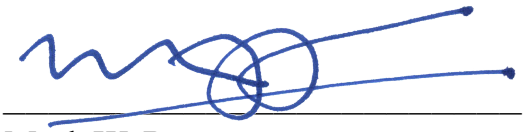
Mark Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com

Certificate of Service and Compliance

A copy of this petition was served upon the State of Texas by electronic filing and on January 11, 2017 by email to attorneys for the State Lisa McMinn, P.O. Box 13046, Austin, Texas 78711-3046, at lisa.mcminn@spa.texas.gov and Jason Larman, 207 W. Phillips, Second Floor, Conroe, Texas 77301, at jason.larman@mctx.org.

This petition uses Matthew Butterick's Equity and Concourse typefaces in 14-point. Margins are 1.5 inches, on principles suggested by Butterick's *Typography for Lawyers*.

According to Microsoft Word's word count, this petition comprises 1,879 words, not including the: caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.



Mark W. Bennett